Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Petition for Preemption of Article 52 of the San Francisco Police Code Filed by the Multifamily Broadband Council	))))	MB Docket No. 17-91

REPLY COMMENTS

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EXECUTIVE SUMMARY

A single fact shines through the record amassed in this docket: Article 52 of the San Francisco Police Code will harm competition, MDU residents, and building owners in San Francisco. Nearly a dozen small, competitive service providers filed comments supporting MBC's Petition, corroborating the business realities that MBC described and explaining the market distortions Article 52 would cause. Article 52 would strip such providers of the ability to secure financing for broadband deployment, eviscerating competition in the MDU marketplace. Property owners and management companies concur, explaining that Article 52's mandates are both impractical and harmful to consumers. Associations representing family housing units and service providers also agree, showing that Article 52 disempowers consumers by eliminating the benefits that building owners could negotiate with service providers in the pre-Article 52 environment. Even Article 52's champions concede that, as written, the ordinance would result in the "significant degradation" of service. These facts demonstrate that Article 52 undercuts federal policy goals and must be preempted.

Instead of contesting the ordinance's harms, supporters of Article 52 try to divert attention by mischaracterizing what the ordinance says and does – though they cannot seem to agree with one another on these topics. Opponents first argue that Article 52 is merely another in a long line of local or state mandatory access rules. This, of course, provides no help, because the relevant question is not whether Article 52 breaks new ground, but whether it conflicts with federal law. Any ordinance that mirrored Article 52 would be preempted. But the Petition's opponents ultimately undermine their case for Article 52's ordinariness by simultaneously touting the numerous differences that make it unique, including the unprecedented mandate that competing service providers be allowed to "use any existing wiring" in an MDU, which the City and County of San Francisco ("the City") contends makes Article 52 a "first-in-the-nation law." The Fiber Broadband Association ("FBA") and CALTEL try to conjure limits on Article 52's scope to mitigate conflict with federal policy, but their imagined boundaries have no basis in the ordinance's text, and their points are contradicted by the author of the ordinance, the City. CALTEL and the FBA likewise insist that Article 52's scope is limited to coaxial cable, but this claim similarly ignores the text of provision and the ordinance's broad goals. Opponents' *post-hoc* effort to limit Article 52 to facilities that are "idle" or disconnected, or that "lie fallow," meets a similar fate, as there is no support for any such reading in Article 52 itself. In short, Article 52 does not resemble traditional local and state mandatory access provisions.

Article 52's supporters insist that the provision is necessary to promote broadband competition in MDUs in San Francisco. Even if they were correct, their argument would be beside the point, because local officials are not permitted to take actions that conflict with federal law, regardless of whether they believe they have a compelling reason for doing so. In any case, Article 52 is *not* a victory for competition or for small providers. Rather, Article 52 expressly excludes many small providers from its reach. There is evidence, moreover, that the City adopted Article 52 specifically to facilitate its *own* deployment plans at the expense of smaller providers. MBC noted in its Petition that the anti-competitive threat of Article 52 is aggravated by the City's apparent desire to offer a municipal broadband service, and the City does not deny this objective. Ultimately, the ordinance tilts the playing field against property owners and small service providers, to the detriment of consumers and competition. That outcome contravenes the Commission's policy goals and conflicts with specific areas of federal law and policy.

Opponents of the Petition also rely on a bevy of erroneous conceptions regarding the law of preemption itself. They argue that there can be no conflict preemption because the Commission has not expressly prohibited that which Article 52 requires. As the Supreme Court has made clear, however, conflict preemption applies not only "when compliance with both federal and state regulations is a physical impossibility," but also "when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." In particular, a state or local requirement that disrupts a balance struck by federal policy-makers conflicts with, and is preempted by, federal law. The City cites various cases meant to counter this simple point, but none of its precedents rebut the case for preemption here. Indeed, the City *admits* that Article 52 was meant to supplant the balance struck by federal law and policy, arguing that the provision was enacted because "[e]fforts by this Commission and the California Public Utilities Commission to enhance competition among providers of communications services in MDUs have not been successful." This is not a permissible objective.

Article 52's proponents also place excessive focus on the stated *purpose* of Article 52 rather than on the provision's actual effects. What matters is not whether the requirement under consideration *aims* to conflict with federal policy, but whether it will, *in fact*, have the practical effect of frustrating federal goals. As MBC and others have shown, Article 52 will diminish competition in the MDU marketplace, particularly by smaller providers that require financing to fund network build-out, and also will undercut, not promote, the Commission's broader pro-deployment, pro-competition objectives.

There is no merit to arguments that Article 52 cannot be preempted by federal law because the Commission has not directly regulated property owners in the building-access context. In the D.C. Circuit's words, "federal law may preempt state [or local] law even if the conflict between the two is not facially apparent – as when, for example, the federal and state laws govern different subject matters." The appropriate focus is not on whether federal and local laws regulate the same entities, but whether the local requirements impair or frustrate the federal scheme. Nor should any weight be afforded to claims that there can be no preemption here because the Commission has not previously held that "wire sharing pursuant to a state or local law or ordinance would contradict federal policy." The Supreme Court has underscored that there need be no specific, formal agency statement identifying a conflict in order for a decision-maker to conclude that preemption is warranted.

The Petition's opponents have no real response to MBC's specific preemption claims, either. First, Article 52 conflicts with the Commission's longstanding competitive access framework with regard to multi-tenant buildings, which provides property owners with certainty as to their rights to home run wiring upon termination of an incumbent's service. This approach has benefitted property owners, providers, and consumers alike, but Article 52 seeks to displace the Commission's policy in favor of the City's. The ordinance thus re-balances the considerations underlying the Commission's policies, frustrating federal objectives. The City's effort to save the ordinance from preemption falls flat: Contrary to its claims, Article 52 does not support the Commission's objectives. Instead, it places severe constraints on a property owner's ability to bargain for the optimal mix of communications services on behalf of his or her tenants – a point confirmed by multiple commenters. Nor can proponents save the ordinance by inventing limitations that appear nowhere in the provision's text, or by pretending that the Commission has banned exclusive video contracts in MDUs when it affirmatively has chosen *not*

to do so. Finally, the fact that Article 52 regulates wiring owned by *property owners* is irrelevant: The Commission is authorized (and indeed required) to preempt local laws that frustrate federal objectives that fall within its purview, and regulation of exclusive wiring contracts, and the rights of property owners and service providers to inside wiring generally, are unquestionably matters within the Commission's jurisdiction.

Second, Article 52 conflicts with federal law and policy regarding bulk billing arrangements. The Commission affirmatively has endorsed the use of such arrangements, finding that they "predominantly benefit consumers, through reduced rates and operational efficiencies, and by enhancing deployment of broadband." Article 52 effectively bars such arrangements by destroying the economic rationale on which bulk billing deals are struck and raising prices for tenants. The ordinance would leave smaller independent service providers unable to obtain the necessary third-party financing. Article 52 thus negates a valid federal policy, attempting to "re-balance" the considerations that led the Commission to allow bulk-billing arrangements in the first place. The City's effort to liken the current scenario to cases in which the federal government had failed to adopt *any* formal policy (and in which there was, accordingly, no preemption) falters – unlike the cases the City cites, this matter involves a Commission order reflecting a careful balancing of competing concerns, and a formal finding that "the benefits of bulk billing outweigh its harms." The City's suggestion that nothing in Article 52 prohibits MBC's members from enforcing their bulk-billing agreements or using the existing wiring to provide service is simply inapt, because federal law preempts not only state or local law that *expressly prohibits* that which federal law expressly allows, but also state or local requirements that undermine federal policy objectives, or have the "practical effect" of conflicting with federal law.

Third, Article 52 conflicts with federal law and policy regarding network-sharing mandates. The ordinance compels property owners to allow any communications service provider to use their inside wire, without any showing that this shared access is necessary or appropriate to promote consumer choice and competition. The Commission has found that mandatory sharing of next-generation network facilities blunts the deployment of advanced telecommunications infrastructure and deters network investment. Opponents focusing on the specific scope of Section 251(c)(3) miss the point: Federal policy looks upon network-sharing mandates with great skepticism, whether the facilities are owned by ILECs or other parties. In particular, such requirements conflict with Section 706's mandate to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans." Section 706's scope and its role in assessing network-sharing obligations are not limited to ILEC facilities or even common carrier services, as decisions such as the *Cable Modem Order* make clear.

Fourth, federal law occupies the field with respect to inside wiring. As the City acknowledges, Article 52 compels the sharing of inside wires. The Commission's comprehensive regulation of cable home wiring and home run wiring leaves no room for the City to impose its own wire sharing requirements. Indeed, the Commission has twice expressly refused to mandate sharing of home run wiring by multiple providers, citing signal interference concerns that Congress has placed squarely within the Commission's purview. Again, Article 52's defenders fail to rebut the governing precedent. Contrary to their claims, Article 52 repeatedly makes clear that its broad wire-sharing mandate is not limited to "existing wiring."

Nor is it true, as the FBA suggests, that only one provider can use existing wiring at a time under the provision. Where a subscriber switches providers for only part of the bundle, Article 52 calls for sharing of the relevant wires. Finally, the City is wrong to claim that Article 52, which regulates property owners, addresses a different "field" than that regulated by the Commission. The Commission's decisions reflect that the sharing of inside wiring is a matter of federal, not state or local, concern, irrespective of which party the sovereign tries to regulate.

For the reasons discussed herein and in MBC's Petition, the Commission should find that Article 52 is preempted by federal law and policy and is therefore invalid.

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REPLY COMMENTS

The Multifamily Broadband Council ("MBC")[1] hereby replies to the opening comments filed in response to MBC's Petition seeking a declaratory ruling that Article 52 of the San Francisco Police Code[2] is preempted by federal law and policy and therefore is invalid in its entirety. The opening comments overwhelmingly corroborate the problems associated with Article 52 as set forth in MBC's Petition. Nearly two dozen parties submitted comments describing the various harms that will befall consumers, property owners, and competition generally if the City of San Francisco ("the City") is allowed to enforce Article 52. These diverse commenters include representatives of large and small communications providers serving customers in multi-dwelling units ("MDUs") and of owners and managers of MDUs. Many of these parties do business in San Francisco. As such, they have specific knowledge of the communications marketplace for MDUs there and a strong interest in protecting their customers and tenants from Article 52's significant flaws. Indeed, one of these parties reports that it has put on hold all plans to launch service at new San Francisco locations pending the resolution of

[1] MBC is the voice for non-franchised communications companies that provide broadband-related services to multifamily communities, and their vendors. MBC is a technology-agnostic organization. Its members deliver several technologies to multifamily communities such as wireless, cable modem, DSL, Active Ethernet, and Fiber-to-the-Home.

[2] Article 52 of the San Francisco Police Code, Ordinance No. 250-16 ("Article 52").

this proceeding.[3] As discussed below, the handful of parties that strive to defend Article 52 are unable to rebut this extensive evidence or mount an effective legal case against preemption. Accordingly, the Commission should grant MBC's Petition.[4]

DISCUSSION

I. THE FACTUAL RECORD CONCLUSIVELY DEMONSTRATES THE HARMS ASSOCIATED WITH ARTICLE 52.

Amidst opponents' paeans to Article 52's asserted purpose of promoting consumer choice, a single fact shines through the record: Article 52 will cause real harms to competition, to MDU residents (particularly those on the wrong side of the digital divide), and to building owners in San Francisco.

This stark truth stems in part from the critical role small providers have to play in closing the digital divide. As Chairman Pai rightly explained in connection with the recent *Restoring Internet Freedom NPRM*, "small ISPs" are "the very companies that are critical to injecting competition into the broadband marketplace" and to "closing the digital divide by building out in low-income rural and urban areas."[5] Thus, it is especially telling that nearly a dozen small, competitive service providers – companies that compete against larger incumbents and in the process allow market forces to drive deployment to MDUs – have filed in support of MBC's

[3] *See infra* n.12 and associated text.

[4] The Commission's recent draft Notice of Inquiry concerning competitive access issues does not and need not impact its consideration of MBC's Petition. *See Improving Competitive Broadband Access to Multiple Tenant Environments*, Notice of Inquiry, GN Docket No. 17-142, FCC-CIRC1706-05 (draft). Apart from the fact that a Notice of Inquiry cannot directly result in any conclusive Commission resolution of these issues, deferring action on the Petition will needlessly perpetuate the various harms associated with Article 52. Moreover, the Commission can grant the Petition without curtailing its consideration of industrywide issues in any Notice of Inquiry it may later adopt.

[5] *Restoring Internet Freedom*, Notice of Proposed Rulemaking, FCC 17-60, WC Docket No. 17-108, at 60 (rel. May 23, 2017) (Statement of Chairman Ajit Pai).

Petition.[6] These small providers corroborate the business realities described in MBC's Petition, explaining the distortion Article 52 would cause – namely, by "overriding voluntary, contractual arrangements that are preconditions to the financing required for buildouts in multi-family buildings,"[7] nullifying arrangements negotiated by small providers (and precluding future arrangements),[8] and thereby blocking those small providers from the market. Small competitive providers "depend[] on property owner investments in cabling infrastructure" and cannot "self-fund their network buildouts through cash flows generated from complementary revenue streams."[9] As their comments show, Article 52 would strip these providers of the ability to "demonstrate to [their] investors that [they] can successfully serve enough customers to generate a reliable revenue stream."[10] As a result, such companies' ability to "secure financing to construct … distribution system[s] in the community" would evaporate.[11]

It is no surprise – but should be quite concerning – that small provider Data Stream has "put all plans on hold to launch properties in San Francisco pending the outcome of this

[6] Comments of Blue Top Communications, MB Docket No. 17-91 (filed May 19, 2017); Comments of Consolidated Smart Systems, LLC, MB Docket No. 17-91 (filed May 15, 2017) ("Consolidated Comments'); Comments of Data Stream, Inc., MB Docket No. 17-91 (filed May 12, 2017) ("Data Stream Comments"); Comments of DIRECPATH, LLC, MB Docket No. 17-91 (filed May 18, 2017) ("DIRECPATH Comments"); Comments of DIRECT PLUS, LLC, MB Docket No. 17-91 (filed May 17, 2017); Comments of Elauwit Networks, LLC, MB Docket No. 17-91 (filed May 18, 2017) ("Elauwit Comments"); Comments of GigaMonster, LLC, MB Docket No. 17-91 (filed May 18, 2017) ("GigaMonster Comments"); Comments of Privatel Inc., MB Docket No. 17-91 (filed May 17, 2017); Comments of Satel, Inc., MB Docket No. 17-91 (filed May 11, 2017); Comments of Spot On Networks, LLC, MB Docket No. 17-91 (filed May 12, 2017); Comments of Vicidiem, Inc., MB Docket No. 17-91 (filed May 17, 2017).

[7] Consolidated Comments at 2-3.

[8] *See* Data Stream Comments at 3.

[9] Elauwit Comments at 2.

[10] *Id.*

[11] GigaMonster Comments at 2.

petition."[12] At a time when parties and policy-makers agree on the fundamental necessity of providing broadband access to all and on the special role played by smaller entities in filling the gaps left by their larger rivals, regulations pushing small broadband providers from the market can only be understood as harmful to federal objectives.

Support for MBC's Petition is not limited to service providers themselves. Several property owners and management companies – entities that do not ordinarily engage with this level of interest in a Commission proceeding – have been compelled to speak out against Article 52's harms from their distinct perspective.[13] They describe how Article 52's mandates are both impractical (due to issues including the limited space for competitors' facilities in MDUs[14] and the technical incompatibility of competing systems[15]) and harmful to consumers (because they increase the likelihood of interference,[16] decrease the likelihood of provider entry[17] and upgrades,[18] and remove landlords from their important role as insurers of quality control[19]).

[12] Data Stream Comments at 3.

[13] *See, e.g.*, Comments of Alliance Residential, LLC, MB Docket No. 17-91 (filed May 12, 2017); Comments of AvalonBay Communities, Inc., MB Docket No. 17-91 (filed May 18, 2017) ("AvalonBay Comments"); Comments of Camden Property Trust, MB Docket No. 17-91 (filed May 18, 2017) ("Camden Comments"); Comments of Holland Partner Group, LLC, MB Docket No. 17-91 (filed May 16, 2017) ("Holland Comments"); Comments of Prometheus Real Estate Group, Inc., MB Docket No. 17-91 (filed May 18, 2017) ("Prometheus Comments").

[14] *See, e.g.*, AvalonBay Comments at 2; Holland Comments at 3; Prometheus Comments at 3.

[15] *See, e.g.*, Camden Comments at 6 (noting technical incompatibility issues across technology generations, and that under Article 52, providers are less likely to agree to "technology refresh obligations" mitigating such concerns).

[16] Camden Comments at 5-6; Holland Comments at 3.

[17] AvalonBay Comments at 2; Holland Comments at 4.

[18] AvalonBay Comments at 2; Camden Comments at 6.

[19] AvalonBay Comments at 3; Holland Comments at 2-3.

Similarly, associations representing family housing units[20] and service providers[21] reinforce the record evidence demonstrating the very real harms stemming from Article 52. Again, these comments show that Article 52 actually *disempowers* consumers by "eliminat[ing] the consumer benefits that result when the building owner negotiates the terms and conditions of building access … on behalf of the tenants" – that is, Article 52 unnecessarily strips tenants of a mechanism to achieve advantageous negotiating scale.[22] The associations bolster the overwhelming evidence that Article 52 will cause technical problems that impede the quality of service.[23] Notably, even Article 52's champions concede that, as written, the ordinance's broad mandate would lead to scenarios resulting in the "significant degradation" of service.[24]

These diverse factual attestations to the harmful consequences of Article 52 underscore that, despite being styled as a vehicle for promoting consumer "choice" among communications services, the ordinance is less concerned with helping MDU residents and more about forcing small providers out of the market entirely in favor of the larger entities that shepherded it into law – including Google and the City itself, as discussed in MBC's Petition.[25]

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[20] Comments of the National Apartment Association, MB Docket No. 17-91 (filed May 17, 2017) ("NAA Comments"); Comments of the National Multifamily Housing Council, MB Docket No. 17-91 (filed May 18, 2017) ("NMHC Comments").

[21] Comments of NCTA – The Internet & Television Association, MB Docket No. 17-91 (filed May 18, 2017) ("NCTA Comments").

[22] *See, e.g.*, NAA Comments at 2.

[23] *See, e.g.*, NCTA Comments at 4; NMHC Comments at 12-14.

[24] Comments of California Association of Competitive Telecommunications Companies ("CALTEL"), MB Docket No. 17-91, at 3 (filed May 18, 2017) ("CALTEL Comments") ("[T]here is no technically-feasible means for two providers to share coaxial inside wire without incurring significant degradation of both their services."). CALTEL proceeds to argue that, because of these technical problems, a "reasonable reading" of Article 52 is that it does not require wire sharing – despite its plain text compelling exactly that. *Id.*; *see also infra* Section II.B.

[25] Multifamily Broadband Council Petition Preemption, MB Docket No. 17-91, at 7 & n.19 (filed Feb. 24, 2017) ("MBC Pet.").

A final negative consequence of Article 52 has taken on particular significance in light of recent Commission initiatives: namely, the ordinance's deleterious effect on facilities-based investment, deployment, and competition. Indeed, as the City's comments confirm, Article 52 was specifically designed to spare competing service providers the trouble of building out their own facilities and thereby facilitate their entry into MDUs by riding on the backs of companies that already have undertaken that investment.[26] In its concurrent *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, *Accelerating Broadband Deployment*, and *Removing Barriers to Wireline Broadband* dockets, the Commission has specifically sought to *promote* infrastructure investment, teeing up the use of the agency's "authority to preempt any unnecessary regulatory roadblocks" to facilities-based competition and deployment.[27] Those inquiries are consistent with the Commission's longstanding commitment to promoting deployment.[28] As Commissioner O'Rielly observed in

[26] *See, e.g.*, Opening Comments of the City of San Francisco, MB Docket No. 17-91, at 6 (filed May 18, 2017) ("San Francisco Comments") ("[T]he cost of replicating existing wiring can impose a barrier to entry for many competitive carriers. The City hoped to eliminate that barrier by allowing a new provider to use that existing wiring where it was feasible to do so.").

[27] Ajit Pai, Chairman, Federal Communications Commission, *Infrastructure Month at the FCC* (Mar. 30, 2017), https://www.fcc.gov/news-events/blog/2017/03/30/infrastructure-month-fcc.

[28] *See, e.g.*, *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking and Notice of Inquiry, 32 FCC Rcd 3330 (2017); *id.* at 3388 (Statement of Commissioner O'Rielly) ("The Commission cannot continuously hear accounts of deployment hurdles and sit idly by. If this generates the need for preemption, I have no hesitation to use authority provided by Congress[.]"); *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, 32 FCC Rcd 3266, 3267 ¶ 1 (2017) ("propos[ing] and seek[ing] comment on a number of actions designed to accelerate the deployment of next-generation networks and services by removing barriers to infrastructure investment"); *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd 13994 (2009); *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, Report and Order*, 29 FCC Rcd 12865 (2014), *aff'd*, *Montgomery Cty. v. FCC*, 811 F.3d 121 (4th Cir. 2015).

March, "[p]reemption will be the mechanism to push localities to make the right decision."[29] And as the Chairman laid out in discussing his "Digital Empowerment Agenda," the Commission has broad power to eliminate barriers to infrastructure deployment, and "[i]t is time … to fully use that authority to preempt needless municipal barriers."[30]

In short, Article 52 is the very sort of municipal barrier to infrastructure investment and facilities deployment that the Commission has targeted elsewhere. It is at least as pernicious as other local roadblocks, given its disproportionate impact on low-income consumers living in multi-tenant environments, ranging from apartment buildings to student housing to elder-care facilities. The Commission should preempt Article 52 and signal its commitment to fostering, rather than discouraging, facilities-based deployment and competition.

II. UNABLE TO MARSHAL FACTS TO REBUT MBC'S PETITION, OPPONENTS INSTEAD RELY ON MISTAKEN CHARACTERIZATIONS OF ARTICLE 52 AND THE LAW OF PREEMPTION.

In sharp contrast to the factual record developed by MBC and supporters of the Petition, opponents fail almost entirely to present factual evidence regarding Article 52's real-world consequences. Instead, they rely on deeply flawed presumptions regarding the ordinance itself and its relationship to other "building access" mandates, as well as a series of misconceptions regarding the law of preemption. MBC addresses these errors here, and then turns to arguments concerning its specific preemption requests.

[29] Brendan Bordelon, *O'Reilly Hints at FCC Push to Pre-empt Local Laws on 5G Deployment This Year*, Morning Consult (Mar. 7, 2017), https://morningconsult.com/2017/03/07/orielly-hints-fcc-push-pre-empt-local-laws-5g-deployment/.

[30] Ajit Pai, Commissioner, Federal Communications Commission, Remarks at The Brandery: "A Digital Empowerment Agenda," Cincinnati, Ohio, at 7 (Sept. 13, 2016).

A. Article 52 Is a "First-in-the-Nation" Law That Is Materially Different From Other Mandatory Access Provisions.

Instead of contesting the ordinance's harms in any meaningful way, supporters of Article 52 try to divert attention from them by mischaracterizing what the ordinance says and does. Critically for present purposes, Article 52's author and its third-party supporters are fundamentally at odds on these subjects – as described below, their comments reflect widely divergent views about some of the ordinance's critical requirements. The fact that Article 52's champions cannot even agree among themselves about what it requires highlights the need for preemption.

For reasons known to them alone, opponents of the Petition seem to believe that Article 52 must survive review if it is merely another in a long line of local or state mandatory access rules, no different from the others. This, of course, is false: The question is not whether Article 52 breaks new ground, but whether it conflicts with federal law. Even if it were true that many prior ordinances mirrored the one at issue here, the fact that those were not challenged does nothing to immunize Article 52 (or those other ordinances) from preemption. And, to be clear, any ordinance that did mirror Article 52 would be preempted by federal law, for the same reasons laid out in the Petition, in the supporting comments filed by third parties, and herein.

In any event, however, the Petition's opponents ultimately undermine their case for Article 52's ordinariness by simultaneously touting the differences that make it so unique.[31] Foremost among these is the unprecedented mandate that competing service providers be

[31] *Compare, e.g.*, Comments of the Fiber Broadband Association, MB Docket No. 17-91, at 2 (filed May 18, 2017) ("FBA Comments ") (claiming that Article 52 "is modeled on numerous other state and local mandatory access laws, some of which have been in place for decades"), *with id.* at 8 ("Article 52 [r]epresents a [n]ew [m]andatory [a]ccess [a]pproach.").

allowed to "use any existing wiring" in an MDU.[32] Despite claiming that it "did not break new ground,"[33] the City prides itself on describing how revolutionary Article 52 is. It explains that, while "[e]xisting mandatory access statutes *all* require competitive providers to install their own facilities," Article 52 "expanded" the traditional scope of mandatory access "by requiring property owners to allow communications providers to access their *existing wiring* to provide service," in order to spare competitors "the cost of replicating existing wiring."[34] This expansion clearly distinguishes Article 52 from prior access mandates: As City Supervisor Mark Farrell (the ordinance's chief architect) boasted: "From our understanding and all the research we did, this is a first-in-the-nation law that we just passed."[35]

Some of Article 52's supporters try to minimize the harms that result from this "first-in-the-nation" law by conjuring limits on its scope that are so attenuated from the ordinance's text and purpose that not even the City recognizes them. First, the City's opening comments expressly disavow the claim by the Fiber Broadband Association ("FBA") and CALTEL that Article 52 "does *not require* mandatory sharing of wires"[36] – which is the basis of their argument against field preemption, as discussed below.[37] Indeed, the City says exactly the opposite, emphasizing that "Article 52 … require[s] property owners to make wiring they own available

[32] Article 52 §§ 5201(b), 5202; *see also* NCTA Comments at 2 ("Article 52's obligation to provide third-party access to wiring installed and maintained by other providers is novel[.]").

[33] San Francisco Comments at 7.

[34] *Id.* at 5-6 (emphasis added).

[35] Dominic Fracassa, *New ordinance gives SF apartment dwellers more Internet options*, SAN FRANCISCO CHRONICLE (Dec. 24, 2016), http://www.sfchronicle.com/business/article/New-ordinance-gives-SF-apartment-dwellers-more-10816442.php.

[36] FBA Comments at 3 (emphasis in original); *see also* CALTEL Comments at 14. In fact, as noted, above, CALTEL states that wire sharing is not possible for technical reasons. *See* CALTEL Comments at 14.

[37] *See infra* Section III.D.

for sharing."[38] The City's view is consistent with Article 52's text, which unconditionally compels the use of "existing wiring" and even clarifies that a property owner with an agreement granting another provider exclusive access to "existing wiring" is not exempt from the ordinance's reach.[39] Needless to say, a scenario in which a property owner allows two providers to utilize "existing wiring" necessarily would result in them sharing the same wiring.

CALTEL and the FBA go further out on their limb by arguing that the only "existing wiring" implicated by Article 52 is coaxial cable.[40] That claim also ignores the text of Article 52 (which, as noted, applies to "*any* existing wiring"), the Commission rules cited in the definition of that term (which do not single out coaxial cable or, for that matter, any other technology), and the ordinance's broad goal of maximizing access in a technology-neutral manner. As the Commission is well aware, service in MDUs today is provided by a range of technologies, including coax, fiber, and twisted pairs,[41] and Article 52 does not insulate any of these platforms from involuntary use or sharing. In fact, CALTEL's and the FBA's narrow readings of Article 52 must come as a surprise to one of their leading members, Google, whose fiber-based service would not utilize coax. It may also be a surprise to Sonic Telecom, a CALTEL member who, CALTEL notes, supported Article 52 but also relies only on fiber (and not coax) to provide service.[42] It defies reason to believe that these companies would have championed an access ordinance that would be of no use to them.

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[38] San Francisco Comments at 23 (emphasis added).

[39] Article 52, § 5203.

[40] CALTEL Comments at 3; FBA Comments at 22. Even if the ordinance were limited to idle coaxial cable (and it is not), that would not negate the harms enumerated above, and thus would not rescue Article 52 from preemption.

[41] *See, e.g.*, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighteenth Report, 32 FCC Rcd 568 (2017).

[42] CALTEL Comments at 6, 8.

Finally, CALTEL's and the FBA's claims that existing wiring must be made available "only if [it] is idle,"[43] supports a service that is being disconnected,[44] or "otherwise lie[s] fallow,"[45] are even more dubious. The absence of such purported limitations from both the text of Article 52 and the City's defense of the provision clearly demonstrate that they are inventions devised by CALTEL and the FBA in a rearguard effort to render an unlawful ordinance more palatable than it is.

The fact that Article 52's supporters cannot agree on what it requires or when it applies should alarm the Commission and signal the very sort of ambiguity and uncertainty that is likely to deter investment. Of course, as the author of the ordinance, the City's reading deserves particular weight – and the City's more aggressive view of the ordinance's reach only strengthens the legal case for preemption as described below.

Disparate interpretations of Article 52 take on added significance in light of Article 52's other troubling innovation: a series of draconian enforcement remedies available only to competing service providers as a cudgel against property owners who guess incorrectly as to the ordinance's requirements. As MBC has described, Article 52 exposes property owners (but no one else) to civil penalties as well as the prospect of litigation by the City Attorney, a communications service provider, and/or a building occupant, any of whom can seek civil damages, attorney's fees, and costs.[46] Given the City's express goal of minimizing providers' costs, there is every reason to expect that the enforcement process will be tilted heavily in their favor. Meanwhile, property owners have no recourse in the event of a dispute with a

[43] *Id.* at 3.

[44] *Id.*

[45] FBA Comments at 24.

[46] *See* MBC Pet. at 19 & n.62 (citing Article 52 §§ 5209-5213).

communications service provider. This asymmetric enforcement regime renders meaningless the so-called "protections" for property owners touted by Article 52's supporters,[47] since property owners invoke them at their own peril. Tellingly, opponents of preemption barely mention, let alone attempt to justify, the inclusion of these anti-property owner remedies in the ordinance.

These defining features of Article 52 remove it entirely from the tradition of local and state mandatory access provisions on which its proponents rely, and put it into a category unto itself. The extent to which Article 52 stands alone is evidenced by a comparison with one statute on which the FBA misleadingly claims Article 52 was "modeled."[48] Section 16-333a of the Connecticut General Statutes allows for the installation of new wiring, but not the sharing of existing wiring.[49] The Connecticut statute provides for civil penalties against any party that violates it[50] and, unlike Article 52, does not create any right of action against a property owner or authorize damages and costs. This imbalance is exacerbated by how the two laws address compensation for property owners. While the Connecticut statute contemplates procedures for determining and awarding compensation with regulatory oversight – including an appeal process[51] – Article 52 allows the new service provider to propose what it will pay the property owner, who may make a counter-offer but without any regulatory backstop and with the threat of litigation in the event of a dispute.[52] Given how dramatically Article 52 stacks the deck against

[47] FBA Comments at 2, 6.

[48] *Id.* at 2 (citing Conn. Gen. Stat. § 16-333a).

[49] Conn. Gen. Stat. § 16-333a(a).

[50] Under Article 52, only property owners face civil penalties.

[51] Conn. Gen. Stat. §§ 16-333a(e), (g).

[52] Article 52 §§ 5205(b)(4)(B), 5208(b).

property owners as compared to the mandatory access laws that preceded it, the notion that the ordinance reflects the further evolution of the concept simply is not plausible.[53]

In short, Article 52 is neither representative of nor consistent with existing mandatory access statutes, and it is the antithesis of any "model code" for promoting competition in MDUs going forward.[54] Before Article 52's imbalanced "first-in-the-nation"[55] approach is replicated in other jurisdictions – and there are already signs that this propagation is underway[56] – the Commission should preempt it and thereby preserve and promote federal policy goals favoring deployment.

B. The Policy Arguments Offered By Article 52's Supporters Are Misleading and Irrelevant.

Article 52's supporters also try to distract from the ordinance's significant flaws by insisting that it is necessary to promote broadband competition in MDUs in San Francisco.[57] Even if they were correct – and there is much evidence showing that they are not[58] – the

[53] FBA Comments at 2.

[54] CALTEL Comments at 13-14.

[55] Fracassa, *supra*.

[56] For instance, recent media accounts note Google's efforts to enter the MDU marketplace in San Diego, in a manner that hearkens back to its initial overtures in San Francisco. *See* Mike Freeman, *Can Webpass provide alternative to cable, telecom high-speed internet?*, SAN DIEGO UNION-TRIBUNE, May 15, 2017. As MBC has described, Google's active involvement in Article 52's passage followed a familiar blueprint, in which the company, employing the rubric of customer choice and competition, lobbies for regulatory regimes that advantage it while disadvantaging its business rivals. MBC Pet. at 9-11.

[57] CALTEL Comments at 12-13; San Francisco Comments at 3-4; Comments of Engine Advocacy, MB Docket No. 17-91, at 1 (filed May 17, 2018) ("Engine Comments"); Comments of the Institute for Local Self-Reliance, Public Knowledge, and Next Century Cities, MB Docket No. 17-91, at 2 (filed May 18, 2017) ("ILSR Comments").

[58] The record in this docket thus far, combined with previous Commission findings, casts great doubt on claims that Article 52 is necessary to promote competition in MDUs in San Francisco. *See, e.g.*, NAA Comments at 11-13 (citing survey results of NAA members owning or operating apartment buildings in San Francisco, which show robust competition in MDUs); Engine Comments at 2 (stating that "the San Francisco area is home to a relatively large number of competitive providers"); FCC, *List of Counties Where Lower Speed TDM-Based Business Data Services Are Deemed Competitive, Non-Competitive, or Grandfathered*, May 15, 2017, at 2 http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/

argument is beside the point. Local officials are not permitted to take actions that conflict with federal law, regardless of whether they believe they have a compelling reason for doing so. Thus, the Commission need not address, let alone decide, the extent of broadband competition as a general matter, in San Francisco in particular, or in MDUs located there.

Further, portrayals of Article 52 as a victory for small providers should be met with considerable skepticism.[59] First, one of the city supervisors observed that Article 52 picked "winners and losers," and specifically named Google as the main winner.[60] No commenter is able to rebut Google's essential role in the process that led to Article 52 – if anything, they reinforce Google's centrality through frequent cites to the testimony of Charles Barr, founder of Google subsidiary Webpass.[61] Notwithstanding CALTEL's indignation at not being sufficiently recognized for its role in the ordinance's adoption,[62] local press accounts have widely credited Google with leading that charge.[63] It can be no coincidence that Google joined CALTEL in January 2017, just as Article 52 became effective.[64]

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db0515/DOC-344863A1.pdf (listing the County of San Francisco on list of competitive counties for purposes of the Commission's business data services rules); *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, Third Report and Order and Memorandum Opinion and Order, 15 FCC Rcd 11857, 11865 ¶ 20 (2000) (referring to "highly competitive local markets like San Francisco").

[59] *See, e.g.*, ILSR Comments at 3.

[60] SFGovtv, City and County of San Francisco, *Board of Supervisors – Regulatory Meeting* (Dec. 6, 2016), http://sanfrancisco.granicus.com/MediaPlayer.php?view_id=10&clip_id=26700 (Statement of Supervisor Aaron Peskin, beginning at 24:10).

[61] *See, e.g.*, FBA Comments at 9-10; ILSR Comments at 3 n.7. Google committed to acquire Webpass in June 2016 and actually acquired it four months later, all while the record for Article 52 was being developed.

[62] CALTEL Comments at 2.

[63] MBC Pet. at 8-9.

[64] CALTEL, Member Companies, http://www.caltel.org/members2.html (last visited June 8, 2017).

In addition, Article 52 is not available to all communications providers. Rather, it includes an eligibility criterion – possession of a "Utility Conditions Permit from the City under Administrative Code Section 11.9" – that many small providers (including some MBC members) do not have.[65] This is just another way in which Article 52 favors larger providers over small ones. Although CALTEL claims that Article 52 already has benefitted one of its members, Sonic Telecom,[66] that argument is both specious – the ordinance only became effective on January 22, 2017, so there has hardly been any time to test its effectiveness – and irrelevant, since any such success could not rescue the ordinance from preemption it if it conflicts with federal law.[67] Of course, Sonic Telecom's apparent ability to enter MDUs without sharing wire – a focus of CALTEL's comments – cannot save Article 52 from preemption, as other future providers may well take a different approach. If anything, that form of entry merely underscores that Article 52 is not necessary to foster competition.

Finally, there is evidence that the City adopted Article 52 specifically to facilitate its own deployment plans. MBC noted in its Petition that the anti-competitive threat of Article 52 is aggravated by the City's apparent desire to offer a municipal broadband service,[68] and the City does not deny this objective. In fact, the City's policy analysis of that initiative identified access to MDUs as one challenge to be addressed in deploying municipal broadband.[69] It surely is no coincidence that the City launched the process that led to Article 52 shortly thereafter.

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[65] MBC Pet. at 8 & n.22 (citing Article 52 § 5200); *see also* San Francisco Comments at 6.

[66] CALTEL Comments at 12.

[67] Even if Article 52 did benefit Sonic itself, of course, that says nothing about its overall effect on competition.

[68] MBC Pet. at 7 n.19.

[69] City and County of San Francisco Board of Supervisors, Budget and Legislative Analyst Policy Analysis Report: Financial Analysis of Options for a Municipal Fiber Optic Network for Citywide

In the end, efforts to characterize Article 52 in pro-competitive (or pro-consumer) terms fall flat. The ordinance tilts the playing field against property owners and small service providers, to the detriment of consumers and competition. That outcome not only contravenes the Commission's policy goals – which it is pursuing vigorously – but, as discussed below, conflicts with specific areas of federal law and policy.[70]

C. Opponents Mischaracterize the Law Governing Preemption.

Opponents of the Petition also rely on a bevy of erroneous conceptions regarding the law of preemption itself. MBC addresses below parties' responses to its specific preemption requests, but takes this opportunity to correct several misconceptions that pervade these opponents' arguments.

First, opponents of the Petition erroneously argue that there can be no conflict preemption because the Commission has not expressly prohibited that which Article 52 requires. The FBA suggests that the Commission's refusal to adopt a wire-sharing mandate "does not establish a prohibition on mandatory wire sharing."[71] The City, for its part, claims that

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Internet Access, at 59 (Mar. 15, 2016), http://sfbos.org/sites/default/files/FileCenter/Documents/55324-BLA.MuniGigabitFiber-Finance031516.pdf.

[70] Contrary to the FBA's aspersions, *see* FBA Comments at 5-6, MBC and its members welcome competition – provided that it occurs on a level playing field. Indeed, MBC's members and similarly situated companies regularly face competition in MDU environments. *See, e.g.*, Consolidated Comments at 2 ("Consolidated provides [connectivity] services to over 73,000 multi-family units in California and Arizona. In 95% of the communities that Consolidated services we are competing directly with one of the major Telco's or cable companies."); Data Stream Comments at 2 ("Data Stream, Inc. … is a fiber-based gigabit Internet service provider that provides voice and Internet services to residential multi-tenant properties, in direct competition with larger, well-funded entities."); Elauwit Comments at 1 ("Elauwit … provides bulk Internet and television services to residential multi-tenant properties, in direct competition with larger, well-funded entities."); GigaMonster Comments at 1 ("GigaMonster … is a private fiber-based gigabit Internet service provider, offering voice and Internet services to residential multi-tenant properties in direct competition with larger, well-funded entities."). But Article 52 does not create a level playing field – rather, it selects preferred competitors and gives them particular advantages, as described above. There is no basis for a regime in which the City pre-selects marketplace winners and losers.

[71] FBA Comments at 23.

preemption cannot arise from an agency's decision not to apply a specific mandate.[72] These claims misunderstand the governing precedent.

As an initial matter, it is not necessary that it be impossible to comply with both the federal mandate and the state or local directive; it is enough that, as here, the latter undercuts the policies embodied by the former. As the Supreme Court made clear in *Fidelity Federal Savings & Loan Association v. de la Cuesta*, conflict preemption "arises when compliance with both federal and state regulations is a physical impossibility *or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress*."[73] Or, in the D.C. Circuit's words: "Because what must be implied is of no less force than that which is expressed, federal law may preempt state [or local] law even if the conflict between the two is not facially apparent."[74]

As MBC explained in the Petition, a state or local requirement that disrupts a balance struck by federal policy-makers also conflicts with, and is preempted by, federal law. Thus, in *Geier v. American Honda Motor Co.*, which MBC discussed in the Petition but no opponent addressed in response, the Supreme Court struck down a tort-law judgment that effectively required car manufacturers to install airbags when the Department of Transportation had permitted the phase-in of airbags (or other "passive restraints") over time.[75] There, it was clear that federal policy had not *forbidden* the manufacturer from installing airbags. Nevertheless, the Court held, a state tort-law requirement that effectively mandated airbags would have frustrated

[72] San Francisco Comments at 12.

[73] 458 U.S. 141, 153 (1982) (emphasis added) (internal quotations and citations omitted).

[74] *Comm'ns Imp. Exp. S.A. v. Republic of the Congo*, 757 F.3d 321, 326 (D.C. Cir. 2014) (internal quotations and citations omitted).

[75] 529 U.S. 861 (2000).

the federal preference for flexibility, and was accordingly preempted.[76] Likewise, in *Farina v. Nokia*, the Third Circuit explained that "regulatory situations in which an agency is required to strike a balance between competing statutory objectives lend themselves to a finding of conflict preemption" because, in those cases, allowing a state or local requirement "to impose a different standard permits a re-balancing of those considerations."[77] State or local decisions that disrupt an agency's balancing of relevant objectives, the court held, "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[78]

The City itself quotes *Farina*, apparently recognizing the difficulties the decision poses to its argument,[79] but then pivots to other decisions that it hopes will defeat MBC's claims. They do not. For example, in *Sprietsma*, the Supreme Court emphasized that "[a] federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate.'"[80] In that case, the Court held that the U.S. Coast Guard's decision not to require use of propeller guards on motorboats did not a preempt state-law tort claim premised on a motor manufacturer's failure to install such a guard, but only because the decision did *not* reflect the Coast Guard's determination that propeller guards were "unsafe" or otherwise inadvisable.[81] Thus, the Coast Guard's decision "d[id] not convey an authoritative message of a federal policy

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[76] *Id.* at 881.

[77] *Farina v. Nokia*, 625 F.3d 97, 123 (3d Cir. 2010).

[78] *Id.* at 134, quoting *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985).

[79] "When Congress charges an agency with balancing competing objectives, it intends the agency to use its reasoned judgment to weigh the relevant considerations and determine how best to prioritize those objectives. Allowing a state law to impose a different standard [impermissibly] permits a re-balancing of those objectives." San Francisco Comments at 11, quoting *Farina*, 625 F.3d at 123.

[80] *Sprietsma v. Mercury Marine*, 537 U.S. 51, 66 (2002), quoting *Arkansas Elec. Cooperative Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 284 (1983).

[81] *Id.* at 66-67 (internal quotations omitted).

against propeller guards."[82] By contrast, as elaborated below, the Commission *has* issued "an authoritative message of a federal policy" with respect to issues such as bulk billing arrangements (which it has chosen to permit on account of their "pro-consumer effects").[83]

In *Fellner v. Tri-Union Seafoods, L.L.C.*,[84] the claimed preemption had no basis in any binding agency decision at all. Rather, the defendant in a tort case – a seafood company being sued for harmful mercury in its tuna fish products – argued that preemption of state tort law could be implied from certain FDA guidelines.[85] The court disagreed, finding that the cited guidelines were "non-binding" and that the FDA had made "no 'conclusive determination' of the sort which will preempt state law."[86] The court would not "afford preemptive effect to less formal measures lacking the 'fairness and deliberation'" associated with rulemakings and similar proceedings, and thus allowed the plaintiff's tort suit to proceed.[87] Here, in contrast, the Commission *has* released authoritative rules governing the topics at issue – bulk billing, inside wiring, and network-sharing mandates – in the course of full notice-and-comment proceedings bearing the hallmarks of agency "fairness and deliberation." The orders adopted, and the policies that they embody, conflict with Article 52.

Nor is the Tenth Circuit's *Guschke* decision[88] relevant here. There, the court held that the broad federal scheme regulating radio and telecommunications and the Commission's

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[82] *Id.* at 67 (internal quotations omitted).

[83] *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Second Report and Order, 25 FCC Rcd 2460, 2471 ¶ 28 (2010) ("*Exclusivity Second Report and Order*").

[84] 539 F.3d 237 (3d Cir. 2008).

[85] *Id.* at 252-54.

[86] *Id.* at 254.

[87] *Id.* at 245.

[88] *Guschke v. Oklahoma City*, 763 F.2d 379 (10th Cir. 1985).

regulations encouraging the development of the amateur radio service, which had no provisions regarding antenna height, did not preempt local zoning radio tower limitations.[89] "General statements of legislative or regulatory intent to encourage the use and development of amateur radios are insufficient to imply intent to preempt state laws which inhibit amateur radio development."[90] Here, of course, there are several Commission rulings directly on point addressing the areas subject to conflict preemption, rendering *Guschke* facially inapposite.[91]

As these decisions make clear, opponents' claims that Article 52 merely seeks to "complement" the federal regime miss the mark.[92] They also are disingenuous. The City elsewhere admits to a more aggressive intention of supplanting the balance struck by federal law and policy, stating that it was compelled to act because "[e]fforts by this Commission and the California Public Utilities Commission to enhance competition among providers of communications services in MDUs have not been successful."[93] As the Petition made clear and the discussion above underscores, this is not a permissible objective. The Commission has constructed a balanced building access regime, and even efforts meant to supplement and advance that regime would disrupt the federal balance and fall afoul of federal supremacy. As the Supreme Court has long held, "[c]onflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy,"[94] and "[t]he fact of a common end hardly

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[89] *Id.* at 383-84.

[90] *Id.* at 384.

[91] To this end, the City notes that preemption must be "based on specific agency regulations, orders, or decisions." San Francisco Comments at 12. The preemption MBC seeks here *is* based on specific orders and decisions, as the Petition explains at length.

[92] FBA Comments at 14; *see also* San Francisco Comments at 2 ("Article 52 complements the Commission's regulations, orders, and decisions by furthering competition.").

[93] San Francisco Comments at 3.

[94] *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 287 (1971).

neutralizes conflicting means."[95] Here, even if Article 52 actually promoted the general objectives of federal policy (and, as discussed below, it does not), it would be preempted on this basis.

Second, opponents of the Petition erroneously focus their preemption arguments on the stated *purpose* of Article 52 rather than on the provision's actual effects. The City spends pages discussing the *intent* of Article 52,[96] but does not even attempt to refute MBC's factual evidence as to how the provision will in fact undermine competition by smaller providers. Likewise, the FBA allots three pages to discussion of Article 52's intent,[97] concluding that the ordinance "furthers and enhances the Commission's efforts to promote consumer choice and competition" without ever addressing, much less rebutting, the evidence put forth by MBC (and now by other parties) showing that the Article 52 will disserve rather than promote its stated purpose. Nothing in the preemption jurisprudence, however, allows the decision-maker to simply presume that a state or local law is permissible because its intent is consistent with federal goals. What matters is not whether the requirement under consideration *aims* to conflict with federal policy, but whether it will, in fact, have the practical effect of frustrating federal goals.[98] As MBC and

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[95] *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 379-80 (2000).

[96] San Francisco Comments at 3-6.

[97] FBA Comments at 17-19.

[98] *See, e.g.*, *Michigan Canners & Freezers Ass'n v. Agricultural Marketing & Bargaining Bd.*, 467 U.S. 461, 478 (1984) (although state law did not force farmers to join marketing cooperative associations, because it had the "practical effect" of imposing the incidents of association membership on farmers by binding them to the association's marketing contracts, it was preempted by federal law prohibiting coerced association membership); *Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977) (although state weight labeling law was not expressly preempted by provision in federal weight labeling law preempting state laws less stringent than or requiring different information from federal law, state law was preempted "as interpreted and applied" to packaged flour because the law failed to take into consideration weight differences resulting from variations in moisture, contrary to the intent of more flexible federal law); *Universal Service Contribution Methodology*, Declaratory Ruling, 25 FCC Rcd 15651, 15659 ¶ 19 (2010) (duplicative state USF assessments "conflict with the federal rules and policies governing interconnected VoIP services because their practical effect is to increase the portion of interconnected VoIP revenue

others have shown,[99] providing evidence that opponents have barely acknowledged, much less addressed, the effect of Article 52 will be to diminish competition in the MDU marketplace, particularly by smaller providers that require financing to fund network build-out. Put differently, in addition to conflicting with the Commission's specific policies with regard to inside wiring, bulk billing, and mandatory network sharing, Article 52 will undercut, not promote, the Commission's broader pro-deployment, pro-competition objectives. The fact that its supporters intended otherwise is meaningless.

Third, there is no merit to the FBA's claim that Article 52 could not be preempted by federal law because the Commission has not directly regulated property owners in the building-access context.[100] In the D.C. Circuit's words, "federal law may preempt state [or local] law even if the conflict between the two is not facially apparent – as when, for example, the federal and state laws govern different subject matters."[101] The appropriate focus is not on whether federal and local laws regulate the same entities, but whether the local requirements impair or frustrate the federal scheme. Here, as detailed in the Petition and below, they do, even if the federal regime does not itself apply mandates to the same class of entities targeted by the local ordinance.

Fourth, the FBA is wrong to suggest that there can be no preemption here because the Commission has not previously held that "wire sharing pursuant to a state or local law or

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assigned to the intrastate jurisdiction beyond that contemplated under the [FCC] rules"); *Commercial Communications, Inc.*, Memorandum Opinion and Order, 81 F.C.C.2d 106, 113-14 ¶ 26 (1980) (although Oklahoma Corporation Commission regulation of telephone equipment manufacturers did not expressly restrict interconnection of equipment with telephone network, regulation was preempted because, "in practical effect," it restricted such interconnection, in conflict with FCC regulation).

[99] *See supra* Section I.

[100] *See* FBA Comments at 14.

[101] *Comm'ns Imp.*, 757 F.3d at 326, citing *Perez v. Campbell*, 402 U.S. 637 (1971).

ordinance would contradict federal policy."[102] As the Supreme Court held in *Geier*, it has never required "a specific, formal agency statement identifying conflict in order to conclude that such a conflict in fact exists."[103] "To insist on a specific expression of agency intent to pre-empt … would be in certain cases to tolerate conflicts that an agency, and therefore Congress, is most unlikely to have intended."[104] Here, for the reasons MBC has stated, there are multiple conflicts between Article 52 and federal policy. This is true irrespective of whether the Commission has previously identified such conflicts.

For these reasons, and the specific reasons discussed below, Article 52 is preempted by federal law and should be invalidated.

III. ARTICLE 52 IS PREEMPTED BY FEDERAL LAW.

Once opponents' mischaracterizations of Article 52 and the governing law are swept aside and their failure to rebut the robust factual record concerning the provision's actual effect on the provision of service in San Francisco is exposed, they are left with no real response to the specific preemption claims MBC has asserted.

A. Article 52 Conflicts with Federal Law and Policy Regarding Competitive Access to Multi-Tenant Buildings.

As MBC explained in its Petition, the Commission's longstanding competitive access framework with regard to multi-tenant buildings provides property owners with certainty as to their rights to home run wiring upon termination of an incumbent's service.[105] This approach has benefitted property owners, providers, and consumers alike by establishing and preserving

[102] FBA Comments at 24.

[103] *Geier*, 529 U.S. at 884.

[104] *Id.* at 885.

[105] MBC Pet. at 14-18

incentives that promote deployment of facilities and competitive choice.[106] MBC further explained that Article 52 upends this federal policy by rejecting and displacing the Commission's policy judgment favoring property owner control over inside wiring.[107] Article 52 thus re-balances the considerations underlying the Commission's policies, frustrating federal objectives. Accordingly, Commission action under the conflict preemption doctrine is warranted.

The City argues that there is no conflict between federal law and Article 52's mandatory access provision. In doing so, the City points to the Second Circuit's decision in *AMSAT Cable Ltd. v. Cablevision of Connecticut L.P.*,[108] as well as several decisions in which the Commission declined to preempt mandatory access statutes. These decisions are inapposite. As an initial matter, the 1993 *AMSAT* case pre-dated the Commission's policy choices and balancing efforts with respect to competitive access to the inside wiring in multi-tenant buildings, which arose from orders issued between 1997 and 2003.[109] It thus has no bearing here. Furthermore, as discussed at length above, Article 52 is distinguishable from "traditional" mandatory access statutes due to its wire-sharing mandate and its series of draconian enforcement measures targeted at property owners.[110]

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[106] *See, e.g.*, DIRECPATH Comments at 4 ("Prior to the enactment of these rules, DIRECPATH and other PCOs were shut out from being able to serve thousands of communities, due to anti-competitive agreements signed by the large service providers. There is no doubt that this type of thoughtful, evidence-based rulemaking on the part of the FCC has created a more equal playing field in multi-family communities, which has led to more choices for consumers now than ever before.").

[107] MBC Pet. at 18-20.

[108] 6 F.3d 867 (2d Cir. 1993).

[109] *See Telecommunications Services – Inside Wiring*, Report and Order and Second Further Notice of Proposed Rulemaking,13 FCC Rcd 3659, 3685-86 ¶ 49 (1997) ("*Inside Wiring Report and Order*"); *Telecommunications Services Inside Wiring*, First Order on Reconsideration and Second Report and Order, 18 FCC Rcd 1342, 1348-49 ¶¶ 13-14 (2003).

[110] *See supra* Section II.A.

The City acknowledges (as it must) that the Commission adopted its inside wiring rules "on the belief that 'fostering competitive choice in MDUs' required it to put both cable home wiring and home run wiring in the hands of the property owner."[111] Nevertheless, the City asserts that Article 52 is not subject to preemption because it "complements the Commission's regulations by supporting the Commission's policy to foster competition among providers in MDUs by requiring property owners to make wiring they own available for sharing."[112] The record assembled does not support this conclusion.

As MBC observed in its petition, by rejecting and displacing the Commission's policy judgment favoring property owner control over inside wiring – and substituting the City's own business judgment for that of property owners – Article 52 places severe constraints on a property owner's ability to bargain for the optimal mix of communications services on behalf of his or her tenants.[113] Property owners that filed opening comments agree, citing their need to have contracting flexibility,[114] to able to ensure quality services,[115] and to "sensibly curate

[111] San Francisco Comments at 22 (citation omitted).

[112] *Id.* at 23. Likewise, the FBA asserts that "Article 52 does not undercut the Commission's reasoned judgment in creating its inside wiring rules, but furthers and enhances the Commission's efforts to promote consumer choice and competition consistent with the City's jurisdiction." FBA Comments at 19.

[113] MBC Pet. at 19.

[114] NMHC Comments at 8 ("developers require contracting flexibility (including the ability to offer exclusive wiring and bulk service arrangements) in order to provide residents a choice of high quality providers of internet, telephony, and video services – particularly in affordable housing units"). *See also* Declaration of Matt Harris at 2 (attached to NMHC Comments) ("Had the policies of San Francisco's Article 52 been in place in Slidell, Louisiana, the residents of Lakeside Apartments would not have had an endless variety of cutting-edge service providers from which to choose. On the contrary, they would have had *no* video service (unless they had the means and a properly-oriented patio or balcony for placement of a DBS dish). Instead of competitive Internet service, residents would have had *no* Internet service (other than the incumbent telecommunication's carrier's sluggish DSL).").

[115] NAA Comments at 5 ("Tenants have come to expect that building owners will assure that high quality and fairly priced cable and Internet services are available to tenants. But, this role is eliminated because none of the list of acceptable conditions in [Article 52] includes conditions designed to assure residents receive a range of services of expected quality and prices.").

options and to hold providers accountable if they do not provide quality or reliable service."[116] Parties supporting MBC's Petition also underscore that property owners who must relinquish control over their wiring will have little incentive to invest in that that wiring in the first place, which undermines the core rationale of the Commission's inside wiring regime. As RealtyCom Partners explains:

> Owners who can no longer control the wiring they install will be far less likely to expend capital on state of the art fiber and other wiring needed to provide high-quality Services in their MDUs. In the wild-west scenario that Article 52 allows in which multiple Service Providers will be able to gain unfettered access to Owner-owned wiring, the benefits of making significant investment in such wiring will vanish. Owners will have no incentive to install any wiring at Properties where such wiring is up for grabs. Instead, our clients have indicated, they will likely reduce their own infrastructure expenditures and rely on Service Providers to make those types of investments.[117]

The City also tries to evade conflict preemption by asserting that Article 52 addresses "the Commission's concern about [wire] sharing by allowing property owners to refuse a request to share existing wiring when it is not technically feasible."[118] But Article 52 does not use the words "technically" or "feasible," together or separately. Even assuming *arguendo* that Article 52 could be interpreted as establishing this test, the protection that any such exception would afford to property owners is illusory: Not only will they be ill-equipped to evaluate whether a

[116] AvalonBay Communities Comments at 3; *see also supra* Section I (describing harms cited by property owners).

[117] Comments of RealtyCom Partners, MB Docket No. 17-91, at 5 (filed May 17, 2017). *See also* Declaration of Michael Manelis at ¶ 9 ("Manelis Declaration") (attached to NMHC Comments) ("Article 52 also discourages owners from making significant investments to upgrade or future-proof low voltage infrastructure, since a property owner cannot exercise reasonable control over its future use.").

[118] San Francisco Comments at 23. *See also* FBA Comments at 24 ("Rather than forcing wire sharing unconditionally, Article 52 establishes a test of technical feasibility: it requires access to the property owner's wiring only if (among other conditions) such use would not significantly and adversely impact an existing service.").

new entrant's use of existing wiring is "technically feasible," but they face harsh consequences if they get it wrong given the imbalanced enforcement regime described above. As the Executive Vice President of Property Operations of Equity Residential explains, the wiring provisions in his company's agreements with service providers "are critical to ensuring quality service to residents" because his company is "not a telecom provider" and "do[es] not have employees with telecom or wiring expertise."[119] AvalonBay Communities echoes these concerns.[120]

As MBC noted in its Petition, the Commission's rules prohibit many exclusive contracts for provision of video and telecommunications services to multi-tenant properties.[121] However, the Commission has *not* applied this ban to exclusive video contracts in multi-tenant properties.[122] In this respect, Section 5203 of Article 52 cannot be squared with the Commission's rules on exclusive video contracts in multi-tenant properties. Specifically, Section 5203 provides that Article 52's requirements apply to any property owner that is party to an agreement "that purports to grant [a] communications service provider exclusive access to a multiple occupancy building and or the existing wiring to provide services."[123] Yet, because Section 5203 applies to all exclusive contracts in multi-tenant properties, it vitiates any exclusive contract for video or telecom services that a property owner may have with a private cable

[119] Manelis Declaration at ¶ 6.

[120] AvalonBay Comments at 4 ("AvalonBay is not a telecommunications provider. While our employees are highly trained to provide excellent customer service and are proficient at real estate management, they do not have wiring or telecom experience as a whole.").

[121] MBC Pet. at18 n.61.

[122] *See Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235, 20251 ¶ 32 (2007) ("*Exclusivity FNPRM*").

[123] Article 52 § 5203.

operator.[124] This outcome creates an irreconcilable conflict with the Commission's decision to permit such contracts, and, as such, demands preemption.

Finally, opponents of preemption also make much of the fact that Article 52 regulates wiring owned by property owners, which, they claim, places Article 52 outside the Commission's jurisdiction.[125] As described above and in the Petition, this argument ignores the interconnectedness of Commission policies with private property owners' rights. What matters is the fact that Article 52 frustrates and thus conflicts with achievement of the Commission's policy objectives, not which specific type of entity Article 52 regulates.[126] Here, the record demonstrates overwhelmingly that the mandate at issue will directly undercut Commission policy. Article 52 regulates the types of contracts service providers can enter into. In effect, it is a regulation of exclusive wiring contracts, and thus regulates the kinds of property rights service providers can and cannot have in system wiring. This, in turn, shapes the type of *investments* they are willing to make. Regulation of exclusive wiring contracts, and the rights of property owners and service providers to inside wiring generally, are unquestionably matters within the Commission's jurisdiction.

[124] CALTEL counters that Article 52 does not affect "existing wire exclusivity arrangements or prevent negotiation of new ones" because existing providers are not required "to relinquish cable inside wire to a new provider that it is using to provide service to an occupant, nor "share" that wire with new providers (even if that were technically-feasible)." CALTEL Comments at 16. As discussed in further detail above, this argument is not supported by the plain text of Article 52. *See supra* Section II.A.

[125] *See, e.g.*, San Francisco Comments at 9; FBA Comments at 13.

[126] *See supra* Section II.C.

B. Article 52 Conflicts with Federal Law and Policy Regarding Bulk Billing Arrangements.

MBC's Petition demonstrates that Article 52 "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of'"[127] the Commission's "bulk billing" policy governing situations in which a multi-tenant building owner procures communications service for the entire building at a low bulk billing flat fee and then provisions discounted service to the tenants.[128] The Commission has endorsed the use of such arrangements, finding that they "predominantly benefit consumers, through reduced rates and operational efficiencies, and by enhancing deployment of broadband."[129]

As the Commission has recognized, the spreading of fixed costs among many subscribers using common facilities allowed by bulk billing arrangements depends on the provider's ability to serve all or almost all of the tenants in a building.[130] Article 52, however, forces owners of multi-tenant buildings to "allow" any "communications services provider to install the facilities and equipment necessary to provide communications services" and to "use any existing wiring" belonging to the owner "to provide communications services."[131] These provisions effectively bar bulk-billing arrangements by denying the bulk billing service provider the exclusive right to use designated wiring necessary for the delivery of its services and forcing property owners to accommodate multiple providers, thereby destroying the economic rationale on which such deals are struck and raising prices for tenants. Under Article 52, every single new tenant in an MDU could select a new provider, eviscerating any economies of scale and destroying any ability for a

[127] *Farina*, 625 F.3d at 122, quoting *Fellner v. Tri-Union Seafoods, L.L.C.*, 539 F.3d 251 (3d Cir. 2008).
[128] MBC Pet. at 21-25.
[129] *Exclusivity Second Report and Order*, 25 FCC Rcd at 2461 ¶ 2.
[130] *See id.* at 2461-62, 2464-65, 2466-67 ¶¶ 2, 6, 11-14, 19.
[131] Article 52 § 5201(b); *see also id.* § 5200 (definition of "Existing wiring").

small provider to offer bulk-billing arrangements. As MBC has noted, even if there were many fewer providers than that within the building, smaller independent service providers would be left unable to obtain the third-party financing that is necessary in order to finance construction of a single distribution system.[132]

In finding that "the benefits of bulk billing outweigh its harms,"[133] the Commission noted the record evidence of the need for bulk billing arrangements in securing and maintaining financing.[134] The crimping of bulk billing arrangements also will raise the cost of service for residents of multi-tenant buildings by forcing them to choose among much higher priced individual service arrangements.[135] Article 52 thus "negates a valid federal policy"[136] by "interfer[ing] with the Commission's achievement of its valid goal of" permitting bulk billing arrangements and thus "necessarily thwart[s] or impede[s] the operation of a free [multi-tenant building] market."[137] By effectively precluding bulk billing arrangements, Article 52 also conflicts with Commission policy by "re-balancing" the "considerations" that led the Commission to allow them.[138]

The City insists that Article 52 does not conflict with the Commission's bulk billing policies because there are no such policies but merely Commission "inaction," which cannot sustain conflict preemption. As the *Exclusivity Second Report and Order* demonstrates,

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[132] MBC Pet. at 22-23.

[133] *Exclusivity Second Report and Order*, 25 FCC Rcd at 2470 ¶ 26.

[134] *Id.* at 2465-66 ¶ 17.

[135] *See id.* at 2471 ¶ 28 (noting that prohibiting bulk billing "would result in higher … service charges for the vast majority of [multi-tenant building] residents who are content with such arrangements.") (citation omitted).

[136] *NARUC v. FCC*, 880 F.2d 422, 431 (D.C. Cir. 1989).

[137] *Id.* at 430 (affirming Commission's preemption of state regulation of inside wiring to the extent necessary to maintain a free market in the installation and maintenance of inside wiring).

[138] *Farina*, 625 F.3d at 123.

however, this is hardly a case of agency inaction. The Commission "carefully" weighed the benefits and potential harms of bulk billing arrangements in ten detailed paragraphs[139] – including the benefit of enabling providers to secure financing[140] – and found that "the benefits of bulk billing outweigh its harms."[141] The Commission concluded that "on balance, banning bulk billing would harm more MDU residents than it would help."[142] "Accordingly, we will allow bulk billing by all MVPDs to continue because, under current marketplace conditions, it is clear that it has significant pro-consumer effects."[143]

This careful balancing is a far cry from the cases cited by the City. As discussed above, whereas *Sprietsma* involved no federal policy giving rise to preemption,[144] here the Commission has issued "an authoritative message of a federal policy" "allow[ing] bulk billing" arrangements because of their "pro-consumer effects."[145] *Fellner* addressed nonbinding advisory materials without an "authoritative message of a federal policy,"[146] but here the Commission has released an authoritative decision finding about the benefits of bulk billing arrangements.[147] *Guschke* involved no agency action at all,[148] but here the Commission balanced the relevant considerations and provided the necessary "text" for preemption of any state policy that

[139] *Exclusivity Second Report and Order*, 25 FCC Rcd at 2465-70 ¶¶ 16-25.

[140] *Id.* at 2465-66 ¶ 17.

[141] *Id.* at 2470 ¶ 26.

[142] *Id.* at 2463 ¶ 10.

[143] *Id.* at 2471 ¶ 28 (citation omitted).

[144] *Sprietsma*, 537 U.S. at 67 (internal quotations omitted).

[145] *Exclusivity Second Report and Order*, 25 FCC Rcd at 2471 ¶ 28.

[146] *Fellner*, 539 F.3d at 246-47, quoting *Sprietsma*, 537 U.S. at 67.

[147] *Exclusivity Second Report and Order*, 25 FCC Rcd at 2461 ¶ 2 (finding that they "predominantly benefit consumers, through reduced rates and operational efficiencies, and by enhancing deployment of broadband").

[148] *Guschke*, 763 F.2d 379.

undermines the use of bulk billing arrangements.[149] And as in *Farina*, the Commission "use[d] its reasoned judgment to weigh the relevant considerations" under the statute to "determine how best to prioritize between these objectives."[150] "Allowing" the City, via Article 52, "to … second-guess the FCC's conclusion would disrupt the expert balancing underlying the federal scheme."[151]

The City argues that part of the Commission's rationale for permitting bulk billing was that such arrangements do not significantly hinder competitors from serving some tenants and that Article 52 thus is consistent with the Commission's expectation of competition under a bulk billing regime. As the FBA and CALTEL acknowledge,[152] however, the Commission also noted that "[b]ulk billing arrangements may deter second video service providers from providing service in such buildings because residents are already subscribed to the incumbents' services and residents would have to pay for both MVPDs' services."[153] As NCTA explains, Article 52 upsets the economic rationale contemplated by the Commission in allowing bulk billing arrangements by forcing the building owner to share inside wiring with any new provider, thereby undercutting the potential for securing a bulk billing agreement.[154]

The City's reliance on the statement in *ESCOM* that the Commission is not "an economic guarantor of competing communication technologies which may offer similar services to

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[149] *Exclusivity FNPRM*, 22 FCC Rcd at 20237 ¶ 4, 20265 ¶¶ 64-65.

[150] *Farina*, 625 F.3d at 123.

[151] *Id.* at 126. Presumably, if the Commission had performed the same balancing and concluded that bulk billing should be prohibited, the City would not characterize that determination as "inaction." There is no principled basis for a different characterization, for preemption purposes, of the opposite conclusion.

[152] FBA Comments at 26; CALTEL Comments at 20-21.

[153] *Exclusivity Second Report and Order*, 25 FCC Rcd at 2461 ¶ 2. *See also id.* at 2465 ¶ 15.

[154] NCTA Comments at 7; *see also* GigaMonster Comments at 3.

subscribers" is misplaced.[155] Read in context, that statement explains the Commission's holding that it would not permit states to burden one category of provider (Satellite Master Antenna Television ("SMATV") systems in that case) in order to eliminate a supposedly unfair advantage over a competing category (cable television operators):

> State or local government regulatory control over, or interference with, a federally licensed or authorized interstate communications service, intentionally or incidentally resulting in the suppression of that service in order to advance a service favored by the state, is neither consistent with the Commission's goal of developing a nationwide scheme of telecommunications nor with the Supremacy Clause of the Constitution.[156]

Here, the City has "intentionally or incidentally" suppressed bulk billing services provided by small firms requiring outside financing "in order to advance" services provided by larger firms that do not need such financing in order to deploy facilities to a new building. That suppression of competing services – albeit implemented indirectly by coercing building owners to undermine bulk billing agreements – should be preempted, as in *ESCOM*. Although Article 52 is disguised as a vehicle to facilitate consumer choice, its sabotage of bulk billing arrangements will force building tenants to take higher priced services, if they can afford them at all.

The City finally asserts that because "nothing in Article 52 prohibits MBC's members from enforcing their bulk-billing agreements, or using the existing wiring to provide service," Article 52 does not conflict with the Commission's bulk billing policies.[157] As explained above, this argument is fallacious, because federal law preempts not only state or local law that expressly prohibits that which federal law expressly allows, but also state or local law that

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[155] San Francisco Comments at 17, quoting *Earth Satellite Communications, Inc.; Petition for Expedited Special Relief and Declaratory Ruling*, Memorandum Opinion, Declaratory Ruling and Order, 95 FCC2d 1223, 1232-33 ¶ 20 (1983) ("*ESCOM*").

[156] *ESCOM*, 95 F.C.C.2d at 1233 ¶ 20.

[157] San Francisco Comments at 17; *see also* FBA Comments at 25.

undermines federal policy objectives, or has the "practical effect" of conflicting with federal law.[158] Because Article 52 has the economic effect of undermining the Commission's bulk billing policies, it stands "as an obstacle to the accomplishment and execution of" those policies and must be preempted.[159]

C. Article 52 Conflicts with Federal Law and Policy Regarding Network Unbundling Mandates.

The Petition also demonstrates that Article 52 conflicts with federal law and Commission decisions regarding network unbundling mandates. It compels property owners to allow any communications service provider to use their inside wire, without any showing that this shared access is necessary or appropriate to promote consumer choice and competition. This unqualified unbundling requirement is at odds with the Commission's balanced approach to network-sharing mandates, reflected most directly in its Section 251 unbundling precedents. The Commission has found that mandatory unbundling of next-generation network elements "would blunt the deployment of advanced telecommunications infrastructure" and that refraining from such unbundling requirements would "promote investment in infrastructure."[160] Notably, in deciding not to require unbundling of fiber loops serving predominantly residential MDUs, the Commission concluded that "[i]t would be inconsistent with the Commission's goal of promoting broadband deployment to the mass market to deny this substantial segment of the

[158] *See supra* Section II.C.

[159] *Geier*, 529 U.S. at 881 (internal quotations omitted).

[160] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17149, 17153 ¶¶ 288, 295 (2003) (subsequent history omitted).

population the benefits of broadband by retaining the regulatory disincentives associated with unbundling."[161]

In response to this point, the FBA and CALTEL triumphantly proclaim that Section 251 governs only ILEC facilities, whereas Article 52 covers only a building owner's inside wire.[162] This response misses the point: Federal policy looks upon network-sharing mandates of the type at issue here with great skepticism, recognizing the high costs that attend such requirements and permitting them only when absolutely necessary. The Commission's wariness about unbundling, particularly with regard to broadband, is motivated in large part by the Section 706 mandate to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" and, if necessary, to "take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment."[163] Concerns regarding the ways in which network-sharing mandates undercut investment incentives apply across-the-board: The Commission's view on unbundling is not, and should not be, based on the identity of the provider or the technology being used.

For example, in *BellSouth*, the Commission preempted state commission orders requiring the unbundling of the low frequency portion of the customer loop ("LFPL"), finding that those orders conflicted with the Commission's prior decision not to mandate LFPL unbundling.[164] The Commission noted that its unbundling rules were based on Section 706, which requires that "the

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[161] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Reconsideration, 19 FCC Rcd 15856, 15859-60 ¶ 7 (2004) (citation omitted).

[162] *See, e.g.*, CALTEL Comments at 22-23.

[163] 47 U.S.C. §§ 1302(a), (b).

[164] *See BellSouth Telecommunications, Inc. Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to Competitive LEC UNE Voice Customers*, Memorandum Opinion and Order and Notice of Inquiry, 20 FCC Rcd 6830 (2005).

Commission consider the impact that its rules would have on the deployment of advanced telecommunications capability and thus curtailed unbundling in instances where the Commission found the costs of unbundling, including disincentives for innovative deployment, outweighed the benefits of unbundling."[165] In preempting the conflicting state orders, the Commission stated that its "determinations regarding LFPL unbundling incorporate the additional goals and obligations of section 706 and establish deployment of broadband facilities as a goal of the Act that is incorporated into the Commission's unbundling determinations."[166] "[T]hese state requirements undermine the effectiveness of the incentives for deployment, including the advancement of section 706 goals."[167]

The scope of Section 706, of course, is not limited to ILEC facilities or even common carrier services. In the *Cable Modem Order*, the Commission declined to require cable operators offering broadband Internet access to unbundle the underlying transmission capacity of cable modem service, but did not dispute that it could have done so.[168] In the *BPL Internet Order*, the Commission classified broadband over power line-enabled Internet access service as an information service, partly on the basis of Section 706.[169] As in the *Cable Modem Order*, the

[165] *Id.* at 6833 ¶ 7 (citation omitted).

[166] *Id.* at 6845 ¶ 29.

[167] *Id.* at 6846 ¶ 30.

[168] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Inquiry, 17 FCC Rcd 4798, 4825-26 ¶¶ 44-47 (2002).

[169] *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, Memorandum Opinion and Order, 21 FCC Rcd 13281, 13287 ¶ 10 (2006).

Commission, relying on Section 706, also rejected any unbundling requirement for the transmission component of BPL-enabled Internet access service.[170]

Accordingly, the Commission's balanced approach to unbundling next-generation facilities, based partly on Section 706, covers the entire gamut of advanced services, not just ILEC facilities. Article 52 conflicts with that approach and the Commission's underlying policy concerns, and must be preempted in order to "remov[e]" this "barrier[] to infrastructure investment" by small providers seeking to serve multi-tenant buildings.[171]

D. Federal Law Occupies the Field With Respect to Inside Wiring.

As discussed above, Article 52 compels the sharing of wiring – something that the City does not shy away from acknowledging. This imposition of wire sharing is also separately invalid under the "field preemption" doctrine, which applies where "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state [or local] laws on the same subject."[172] As MBC explained in its Petition, the Commission's comprehensive regulation of cable home wiring and home run wiring, combined with its explicit refusal to mandate sharing of home run wiring, leaves no room for the City to impose its own wire sharing requirements.[173] The Commission's detailed framework leaves no room for state or local regulation of wire sharing in multi-tenant properties. Indeed, on two separate occasions the Commission expressly refused to mandate sharing of home run wiring by multiple providers, citing signal interference concerns that Congress has placed squarely within the Commission's

[170] *Id.* at 13290 ¶ 15 ("We believe, as the Commission explained in the *Cable Modem Declaratory Ruling* … , that subjecting BPL-enabled Internet access service providers to these obligations would disserve the goals of section 706 of the 1996 Act.").

[171] 47 U.S.C. § 1302(b).

[172] *Hillsborough Cnty.*, 471 U.S. at 713 (citation and internal quotation marks omitted).

[173] MBC Pet. at 29-32.

purview.[174] These considerations all demonstrate that the federal interest in the regulation of inside wiring is so dominant that it precludes enforcement of Article 52's wire sharing requirement.

Preemption opponents also argue that any adverse effect on the customer that would result from wire sharing is prevented by Section 5206(b)(5)(C) of the ordinance,[175] which says that the landlord may deny competitive entry where "[t]he communications service provider's proposed installation of facilities and equipment in or on the property would … have a significant, adverse effect on the continued ability of existing communications services providers to provide services on the property."[176] This argument fails for several reasons.

First, the provision does not refer to "existing wiring" at all. Had the City intended to limit the broad taking of wiring with this section, it would have been easy enough for the Board of Supervisors to include language to that effect. Second, the plain language that *is* included in this provision does not support the opponents' position. Existing wiring cannot be "installed" by a new provider, since the wiring is already deployed inside the building. Finally, the ordinance clearly treats "existing wiring" and "facilities and equipment" as separate categories. Section 5201(b) provides that property owner interference occurs if the owner "refus[es] to allow a

[174] 47 U.S.C. § 544(e) ("[T]he Commission shall prescribe regulations which establish minimum technical standards relating to cable systems' technical operations and signal quality. The Commission shall update such standards periodically to reflect improvements in technology."); *see also Inside Wiring Report and Order*, 13 FCC Rcd at 3772 ¶ 245; 47 C.F.R. § 76.605.

[175] *See, e.g.*, San Francisco Comments at 9 n.41 ("Article 52 allows a property owner to deny access to existing wiring owned by the property owner where it is not feasible or would adversely affect existing services"); *id.* at 23 ("Article 52 also recognizes the Commission's concern about such [wire] sharing by allowing property owners to refuse a request to share existing wiring when it is not technically feasible."); CALTEL Comments at 17 ("Section 5206 would ensure protection for the existing provider to the extent that use of the existing wiring would interfere with their ability to continue providing video service to the requesting occupant."); FBA Comments at 24 ("Rather than forcing wire sharing unconditionally, Article 52 establishes a test of technical feasibility: it requires access to the property owner's wiring only if (among other conditions) such use would not significantly and adversely impact an existing service.").

[176] Article 52, § 5206(b)(5)(C).

communications services provider to install the facilities and equipment necessary to provide communications *or* use any existing wiring to provide communications services as required by this Article 52."[177] Thus, a landlord cannot block wire sharing based on the "facilities and equipment" exception, because that exception applies only if there is not sufficient space for the new provider's gear, or if installation of the new provider's gear otherwise interferes with the operation of a competing system.

For the foregoing reasons, the FBA's contention that "[o]nly one provider would use the [existing] wiring at a time" also misses the mark.[178] While this is undoubtedly true where the subscriber is taking a bundle of services and then terminates the entire bundle, it is not true where the subscriber switches providers for only part of the bundle (*e.g.*, taking video from the incumbent and broadband Internet access from the new entrant). It is these subscribers that face the prospect of interference or unwanted disconnects under Article 52.

The City also argues that field preemption cannot apply because the existing wiring governed by Article 52 is owned by property owners, and the Commission has only asserted jurisdiction over MVPD-owned wiring.[179] Thus, the City claims, Article 52 "regulates in a *separate and distinct* field."[180] This misconstrues MBC's field preemption claim. As the Petition makes clear, the field that the Commission has preempted is *wire sharing*,[181] not the

[177] *Id.* § 5201(b).

[178] FBA Comments at 23.

[179] San Francisco Comments at 26.

[180] *Id.* (emphasis in original).

[181] *See* MBC Pet. at 30 ("The Commission's detailed framework leaves no room for state or local regulation of wire sharing in multi-tenant properties.").

wiring itself.[182] The salient point is that Article 52 calls for inside wiring to be shared, and the Commission's decisions reflect that the sharing of inside wiring is a matter of federal, not state or local, concern.

CONCLUSION

For the reasons discussed herein and in MBC's Petition, the Commission should find that Article 52 is preempted by federal law and policy and is therefore invalid.

Respectfully submitted,

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[182] As MBC noted in its Petition, the courts have recognized that "the scope of a field deemed preempted by federal law may be narrowly defined." *Farina*, 625 F. 3d at 120 n.25, quoting *Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363, 367 (3d Cir. 1999).